



HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

16th Report of Session 2021–22

**Police, Crime,
Sentencing and Courts
Bill: Government
Amendments**

**Health and Care Bill:
Government Response**

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

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Baroness Andrews

Lord Blencathra (Chair)

Baroness Browning

Lord Goddard of Stockport

Lord Haselhurst

Lord Hendy

Lord Janvrin

Baroness Meacher

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Lord Tope

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Contacts for the Delegated Powers and Regulatory Reform Committee

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Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Sixteenth Report

POLICE, CRIME, SENTENCING AND COURTS BILL: GOVERNMENT AMENDMENTS

1. This Bill was passed by the House of Commons on 5 July. It was introduced in the House of Lords on 6 July and is currently at Report stage. The Government have tabled amendments for Report stage “in response to issues raised during Committee”.¹ The Home Office has provided a supplementary Delegated Powers Memorandum (“the supplementary Memorandum”)² in relation to the amendments.

2. We draw the attention of the House to one delegated power.

Amendments 109B and 109F—new clauses: power to issue a code of practice relating to non-criminal hate incidents

3. Amendment 109B inserts a new clause that gives the Secretary of State power to issue a code of practice about the processing by the police of personal data relating to a “hate incident”³ other than for the purposes of a criminal investigation.
4. According to the supplementary Memorandum (paragraph 20)—

“Non-crime hate incident (“NCHI”) recording is used by the police to collect intelligence on ‘hate incidents’ occurring in communities which do not, by themselves, breach the criminal threshold, but could escalate into more serious harm. The police regard NCHIs as an important tool to record patterns of individual behaviour or local incident ‘hotspots’ which could give rise to safeguarding risks or community tensions”.
5. The code of practice will replace part of existing non-statutory guidance produced by the College of Policing.
6. The code of practice may include, in particular, provision about—
 - whether and how personal data relating to a hate incident should be recorded;
 - the persons who are to process such personal data;
 - the circumstances in which a data subject should be notified of the processing of such personal data;
 - the retention of such personal data, including the period for which it should be retained; and
 - the consideration by the police of requests by data subjects relating to such personal data.

1 [Letter of 4 January 2022](#) from Lord Wolfson of Tredegar QC and Baroness Williams of Trafford to Lord Rosser, Lord Coaker and Lord Ponsonby.

2 Home Office, [Third Supplementary Delegated Powers Memorandum](#), 4 January 2022.

3 “Hate incident” means an incident, or alleged incident, which involves, or is alleged to involve, an act by a person which is perceived by another person to be motivated by hostility or prejudice towards persons with a particular characteristic.

7. The police “must have regard to” the code of practice in processing personal data relating to a hate incident.
8. As we have repeatedly observed,⁴ although a duty to have regard to statutory guidance does not imply a duty to follow it in any or all respects, where legislation requires that regard must be had to statutory guidance, in practice this means that those to whom the guidance applies will normally be expected to follow it—including by the courts— unless there are cogent reasons for not doing so.
9. Amendment 109F provides for the code of practice to be subject to Parliamentary scrutiny but, although the first exercise of the power to make it is subject to the affirmative procedure, all subsequent exercises of the power are subject only to the negative procedure.
10. The supplementary Memorandum (paragraph 30) explains that the first exercise of the power is subject to the affirmative procedure because of—
 - “the clear view expressed during the debate on Lord Moylan’s amendment at Committee stage that the Code should be debated and approved by Parliament”; and
 - “the sensitivities around the processing of personal data relating to [non-criminal hate incidents] further highlighted by the recent Court of Appeal judgment”.⁵
11. The only explanation given for allowing all subsequent exercises of the power to be subject instead to the negative procedure is that this is “in line with the Government’s general approach to statutory guidance and Codes of Practice”.⁶
12. We find it surprising that nothing is said about why the good reasons given for requiring the first exercise of the power to be subject to affirmative procedure scrutiny do not apply equally to subsequent exercises of that power, despite the nature of the power being the same whether it is being exercised for the first time or on any subsequent occasion. Amendment 109F as drafted would allow a code of practice that was subject to affirmative procedure scrutiny to be substantially or completely re-written by regulations subject only to the negative procedure. The nature of the matters that are to be dealt with in the code of practice means that even revisions that may be small in scale could have very significant consequences for individuals (such as an increase in the period for which personal data should be retained).
13. **We are disappointed that the Home Office seeks to justify the use of the negative procedure not by reference to the nature of the power itself but instead by reference to “the Government’s general approach to statutory guidance and Codes of Practice”. We do not consider this to be acceptable: this Committee—and Parliament—are entitled**

4 For example, [37th Report](#), Session 2019–21, para 8; [18th Report](#), Session 2015–16, HL Paper 83, para 13; [20th Report](#), Session 2015–16, HL Paper 90, paras 10–11; [21st Report](#), Session 2015–16, HL Paper 98, para 27; [22nd Report](#), Session 2015–16, HL Paper 102, para 19; [1st Report](#), Session 2016–17, HL Paper 13, para 38.

5 The supplementary Memorandum explains, at para 22, that, “on 20 December 2021, the Court of Appeal found in *Miller v College of Policing* that the recording of NCHIs amounted to a significant interference with an individual’s right to freedom of expression, and so had to be justified in every instance in order to be lawful”.

6 See para 30 of the supplementary Memorandum.

to expect that every power in every bill is instead considered on its merits.

14. **We consider that, unless the Minister can provide a convincing justification for the affirmative procedure applying only to the first exercise of the power to issue a code of practice—and the negative procedure applying to any subsequent exercise of that power, the affirmative procedure should instead apply in all cases.**

HEALTH AND CARE BILL: GOVERNMENT RESPONSE

15. We considered this Bill in our 15th Report of this Session.⁷ The Government have now responded by way of a letter from Lord Kamall, Parliamentary Under Secretary of State for Innovation (Lords), at the Department of Health and Social Care. The response is printed at Appendix 1.

⁷ [15th Report](#), Session 2021-22 (HL Paper 133).

APPENDIX 1: HEALTH AND CARE BILL: GOVERNMENT RESPONSE

Letter from Lord Kamall, Parliamentary Under Secretary of State for Innovation (Lords), at the Department of Health and Social Care, to the Rt Hon. Lord Blencathra, Chair of the Delegated Powers and Regulatory Reform Committee

Thank you for your report following the Committee's scrutiny of the provisions of the Health and Care Bill ("the Bill").

The Government takes the matters raised by this Committee seriously and I have reviewed your report carefully alongside the views of the House.

Before turning to the specific clauses identified in your report, I wanted first to address the general concerns about this Bill, and I hope to reassure the Committee that the powers in this Bill are necessary and that appropriate safeguards and procedures have been taken.

As the Government has repeatedly emphasised, one of the principal intentions of this Bill is to provide the groundwork for greater legislative flexibility within the healthcare system. This is a key request from the health and care system, particularly in response to some of the barriers in the current legislation to collaboration and integration, which have required complex and often bureaucratic workarounds. We are seeking to design a legislative framework that encourages collaboration, breaks down organisational silos, and strengthens integration to support the central ambition of more person-centred services.

Furthermore, the healthcare system is, and always has been, a rapidly evolving one. Demographic changes, medical discoveries, new understandings of how to treat diseases mean that the structures and organisations that make up our NHS need to constantly adapt if they are to continue to deliver world class services. Flexibility is key to ensuring the legislation is future-proofed and enables the system to respond to the changing needs of populations across the UK in future. As such, the Bill contains sufficient and appropriate delegated powers to enable NHS England, arm's length bodies and the Secretary of State to function in an agile and responsive way as new medicines and healthcare innovation emerge.

The Government is committed to ensuring that the delegated powers in this Bill use the most appropriate procedure so that Parliament has due oversight of their use- for example, by using affirmative resolution procedures for areas of significant parliamentary interest, while also allowing ministers and NHSE to influence the day-to-day operation of the system through guidance, which allows flexibility, rapid response to changing circumstances, and a level of detail greater than is appropriate in secondary legislation. We recognise that the Bill contains a significant number of guidance making powers, powers to publish documents and powers of direction. However, we believe these are appropriate because they reflect the often complex operational details, which are better illustrated by examples and guidance rather than legislation. Guidance and other documents also offer more flexibility to reflect emerging practice, and the importance of ensuring that that guidance keeps up with best practice, especially as the system flexes and evolves.

We have carefully considered the Committee's recommendations regarding clause 15, clause 20, clause 70 and clause 144 and schedule 17. To each of these points, our response is set out below.

Clause 15

The Committee's recommendation

“13. If Ministers wish to repeal section 14Z31 by regulations and substitute alternative text, they should use the affirmative resolution procedure rather than the negative.”

Government response

The Government notes the Committee's recommendation and will consider how best to address this concern. There are currently no intentions to enact these regulations and change the basis on which Integrated Care Boards are responsible for arranging services for people. However, we are clear that we would want to ensure all appropriate engagement and consultation with Parliament and the system was undertaken before using these powers and we will continue to engage with the Committee on the issues raised.

Clause 20

The Committee's recommendation

“16. The power to impose a legal liability by merely publishing a document, without any parliamentary scrutiny, is a striking example of disguised legislation. We regard it as an inappropriate delegation of power, which should be removed from the Bill.”

Government response

This power allows NHS England to determine the circumstances in which one Integrated Care Board will be liable to pay for services provided to that person by services commissioned by another Integrated Care Board.

This power has an existing precedent, with NHS England currently having the equivalent power in relation to Clinical Commissioning Groups, pursuant to section 14Z7 of the National Health Service Act 2006. This is included as part of the Who Pays? guidance, which has been used regularly to resolve disputes between CCGs and give clarity on responsibilities.

The proposed power will allow NHS England to ensure that patients are able to access services across the NHS, while also ensuring that the appropriate commissioning body is charged accordingly. Often these provisions are technically complex, and so it is appropriate for NHS England to publish a document setting them out – they are also better illuminated by examples which can be given through guidance rather than on the face of the legislation.

Clause 70

The Committee's recommendation

“18. We draw the House's attention to the Government's justifications for taking this power:

(a) The Memorandum (paragraph 481) states that, although initial consultation has been carried out by NHS England on the content of the regime, full analysis has not been completed and there has not been time to produce a more developed proposal.

We do not accept that the inclusion of regulation-making powers should be a cover for inadequately developed policy.

(b) The Memorandum (paragraphs 481 and 485) says that a Cabinet Office procurement Bill will most likely follow the Health and Care Bill, which may require some amendments to the procurement regulation-making power in the Health and Care Bill.

In other words, clause 70 may in part be a temporary measure. Ministers would not ordinarily propose clauses in one Bill possibly requiring imminent amendment in a subsequent Bill without expecting to face questions.

The House may wish to seek further and better particulars from the Minister concerning the possible effect of any Cabinet Office procurement Bill on the Health and Care Bill, and — given that the justification in (b) appears to negate that in (a) — to press the Minister on why it was necessary to include provision, based on inadequately developed policy, in the Health and Care Bill when the Government intend to introduce a procurement Bill”

Government response

While we appreciate the Committee’s concern regarding the emphasis on NHS England’s consultation in the Delegated Powers Memorandum, we do not agree that the reason for us proposing to provide for the new procurement regime in regulations rather than setting it out on the face of the Bill, is as a “cover for inadequately developed policy”. There is a genuine need for the flexibility that will be achieved by the regime being set out in regulations; to allow it to be adapted to reflect the challenges the health services faces over time, and to allow it to be adapted in light of future changes in broader procurement law brought about by the Cabinet Office procurement Bill.

In response to your concern that the policy is inadequately developed, I should stress that the new procurement proposals have been in development since NHS England published their 2019 recommendations for legislative reform. There has been further engagement as part of the government’s ‘Integration and Innovation’ White Paper and NHS England’s ‘Provider Selection Regime Consultation’ in February 2021 and refined since in partnership with NHS England and via discussions with stakeholders. NHS England has since published its consultation response, which we will integrate into the draft regulations, and we have continued to engage with stakeholders on the technical detail of the policy.

The Government would like to reassure the committee that it was never the intention for the reforms under clause 70 to be a temporary measure, nor is it intended that any regulations made under these provisions will only be in place until the implementation of the Cabinet Office regime. While we have noted that the Cabinet Office procurement Bill will most likely follow this Bill through passage, the changes we are anticipating from the Cabinet Office Bill will be to the existing legal procurement frameworks, primarily the Public Contracts Regulations 2015, and any changes to the arrangements for healthcare service will primarily be minor, in the small number of areas where health care service arrangement interacts with wider public procurement. To minimise the chance of any changes, we continue to engage closely with the Cabinet Office regarding their planned reforms, however for the small changes that may need to be made to

appropriately interact with the Cabinet Office regime, the flexibility of this power may be useful.

The provisions for the arrangement of healthcare services in this bill are an integral part of the wider ambitions of the system to improve integration. It is, therefore, important that these changes are introduced in parallel with wider system reforms, particularly the establishment of statutory ICBs, and it would not be proportionate to wait for the Cabinet Office reforms before implementing these proposals. In addition, while Cabinet Office reforms have a broader scope encompassing the public sector, the regulations under the Health and Care Bill are focused on healthcare services for the NHS that are commissioned by a limited group of authorities.

We will of course be happy to engage further with the Committee as we finalise the draft regulations to ensure all appropriate engagement and consultation with Parliament and the system is undertaken before using these powers.

Clause 144 and Schedule 17

The Committee's recommendation

“23. Legislation, which of its nature affects the legal rights and liabilities of people, should not be capable of being altered by guidance. The purpose of guidance is, as the name indicates, to guide. It should not be used as a disguised attempt to change the law.

26. We consider that the power to define a food or drink product that is “less healthy” should be exercised solely through the making of regulations and not also through the making of guidance. The definition of “less healthy” will have a significant impact on the food and drink industry. For this reason, we also consider that the regulations defining what is meant by “less healthy” should be subject to the affirmative resolution procedure.”

Government response

The Committee is correct that the legislation references technical guidance in order to determine which products are in scope of the restrictions on advertising. In the Supreme Court’s decision of *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208, the court found that it is permissible to refer to an extraneous document in regulations laid before Parliament provided that that document is an existing document whose content is not changeable at the discretion of the Secretary of State and no question of sub-delegation arises. The Nutrient Profiling Technical Guidance of January 2011, falls within these criteria and is an extraneous document which can be referenced in secondary legislation and need not be laid before Parliament.

Furthermore, the use of this guidance for advertising restrictions for less healthy food and drink products is not new, and it has been used by Ofcom since 2007 to determine what can be advertised around child specific programming on TV, although outside of a statutory framework. This guidance is also used in the same way in the promotions and placement restrictions for less healthy food and drink, entitled “Food (Promotion and Placement) (England) Regulations 2021” which were made law on 2nd December 2021. Aligning the advertising legislation with both the current child specific advertising restrictions and the new promotions and placement restrictions will help reduce the burden on industry.

The Technical Guidance is a pre-existing document with which industry is already familiar. It was developed by the Food Standards Agency and there is no question of sub-delegation. The incorporation of the Technical Guidance by reference to it in the legislation is therefore appropriate.

In addition to the above factors, any regulations made under this new power are likely to specify the threshold criterion used to settle whether food is “less healthy”. This is consistent with the approach taken in the Promotions Regulations.

Also of note, at Commons Report stage, the Government agreed to amend Schedule 17 so that it allowed for a statutory duty to consult prior to any changes made to the technical guidance used in the future. This will ensure that industry is able to contribute to any proposed changes that may affect their legal right and/or liabilities. The power to change this guidance is also subject to the affirmative procedure, meaning there will be parliamentary scrutiny if Government decided to use different guidance to determine what is in scope of the policy and restrictions in the future.

Due to the aforementioned factors, we do not think it is necessary to incorporate the technical guidance via secondary legislation into law. It is acceptable and lawful to refer to the extraneous technical guidance.

In response to your second point, regarding the secondary legislation detailing the products in scope of the restrictions, we are comfortable that the negative procedure is appropriate to use in this scenario. The food industry is fast paced and ever changing. Products develop and new products frequently appear on the market, and so a flexible power is required in order to effect any changes in response to sector specific needs and requirements as they arise.

Furthermore, we would like to emphasise that the categories of food and drink in scope of the restrictions have already been consulted on and refined following consultation. The Government is also holding a consultation on the clarity of the drafting of the SIs, which we hope helps inform discussion of this issue in the House.

May I reiterate my gratitude to you and the Committee for your engagement on the Bill and for the important issues that it has raised. I hope that the Committee is reassured by the points set out above and I look forward to continuing to work with the Committee constructively during the remaining stages of the Bill’s passage.

If the Committee requires any further detail on the Government’s plans for secondary legislation, I would be more than happy to discuss.

10 January 2022

APPENDIX 2: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hlregister>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 12 January 2022 Members declared no interests.

Attendance

The meeting was attended by Baroness Andrews, Lord Blencathra, Baroness Browning, Lord Janvrin, Lord Goddard of Stockport, Lord Haselhurst, Lord Hendy, Baroness Meacher, Lord Rowlands and Lord Tope.